93-702

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NENITA S. VILLAR,
et al,

Petitioners

v.

CROWLEY MARITIME
CORPORATION, et al,

Respondents

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether – in this case where alien plaintiffs sued seven alien defendants and one non-alien, diverse defendant, the defendants, in removing the case to federal court, asserted that all seven alien defendants had been fraudulently joined because none of them were subject to the in personam jurisdiction of the Texas courts and the Plaintiffs timely filed a motion to remand on the ground that the defendants did not clearly show in their removal papers that there was "no possibility" that the state court could find in personam jurisdiction as to at least one of the seven alien defendants – the Supreme Court should, particularly in view of such important considerations as federalism, comity and removal/remand law, grant certiorari in order to resolve the following important issues:

1) Whether the federal district court should have <u>first addressed the remand motion before</u> addressing a motion to dismiss the seven alien defendants on the ground of alleged absence

of in personam jurisdiction filed by the defendants? In addressing this issue, the Court would be resolving a conflict between a Panel Majority of the Fifth Circuit on the one hand, and the Seventh Circuit on the other hand, the Panel Majority of the Fifth Circuit in this case holding that the court can first address the in personam jurisdiction motion, and the Seventh Circuit, in Allen v. Ferguson, 791 F.2d 611 (7th Cir. 1961), holding that the federal district court should first address the remand motion and, if it determines that the removing parties have not met their burden of showing that removal was justified, it should order the case remanded to state court, thus permitting the state court to address the question of "in personam jurisdiction". There is a particular need to address this issue because the effect of the holding by the Fifth Circuit Panel Majority in this case is to drastically and improperly shift the burden of proof, as discussed under 2) below.

2) The extent of the removing parties' burden to prove "fraudulent joinder", i.e.

whether the removing parties in this case had the burden to "clearly show" that there was "no possibility" that a state court could have found in personam jurisdiction as to at least one of the seven alien defendants or did defendants have some lesser burden. And whether, if the in personam jurisdiction motion is going to be considered in the removal/remand context, the "no possibility" burden remains on the removing parties or does the burden shift, as held by the Fifth Circuit Panel Majority, to the removed party to prove a prima facie case of in personam jurisdiction? By addressing the question of the appropriate burden in a case such as this one, the Court will be resolving apparent conflicts between Supreme Court law, as reflected in Wilson v. Republic Steel, 42 S. Ct. 35 (1921), and earlier Fifth Circuit cases such as Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983); B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); East Texas Mack Sales v. Northwest Acceptance Corp., 819 F.2d 1877 (5th Cir. 1987) and Laughlin v. Prudential Ins. Co., 882 F.2d 187

(5th Cir. 1989), and decisions of other circuits such as Polous v. NAAS Food, Inc., 959 F.2d 69, 73 (7th Cir. 1992), all squarely placing the "no possibility" burden, or similar burden, upon the removing parties in a fraudulent joinder case, and the decision of the Fifth Circuit Panel Majority in this case, holding in effect that, where the removing parties file an in personam jurisdiction motion immediately after removing the case to federal court, the burden shifts to the removed parties to prove a prima facie case of personal jurisdiction.

3) Whether the removed party, such as Petitioners in this case, should be granted the right to engage in discovery with regard to the remand motion and related motions such as the Respondents' in personam jurisdiction motion? In granting certiorari on this ground the Court would be resolving the severe conflict between the Panel Majority of the Fifth Circuit in this case, holding that Petitioners should not be allowed the engage in discovery with regard to such motions, and the decision of this Court in

Insurance Corp. of Ireland Ltd v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709, 102 S.Ct. 2009, 2107 (1982) and Oppenheimer Fund, Ins. v. Sanders, 437 U.S. 340, 351 n 13, 98 S.Ct. 2380, 2309 (1978) and other Circuit Court cases such as Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1st Cir. 1992); Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 425 (D.C. Cir. 1992); Eaton v. Dorchester Dev. Inc., 692 F.2d 727, 729 (11th Cir. 1982); Wells Fargo and Co. v. Wells Fargo Express Co., 556 F.2d 406, 431 n. 24 (9th Cir. 1977); and Lakkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971), and last, but not least, the dissent in this case, A130 to 144, 990 F.2d at 1500 to 1503, all holding that the removed parties such as Petitioners have the fundamental right to engage in discovery with regard to such motions. There is a particular need to address this point because, when the denial of discovery is coupled with the courts' action in addressing the in personam jurisdiction motion first and the consequent drastic shift in burdens, the removed

parties are essentially completely deprived of any opportunity to have the case remanded, thus violating the fundamental policy of strictly construing removal statutes and favoring, out of respect for federalism and comity, remand in doubtful situations, see Shamrock Oil & Gas Corp. v. Sheets, 61 S.Ct. 868, 872 (1941).

4) Whether the fact that the alien defendant GTO, Inc. ("GTO") was formally registered to do business in Texas, and had an office in Texas, at the time of the accident, makes GTO subject to the in personam jurisdiction of the Texas courts even though GTO terminated such registration after the accident occurred but before suit was filed? This Court has never specifically decided this issue, particularly where it is not clear whether the death of Mr. Villar was at least in part connected with GTO's activities in Texas, compare Hunter v. Mutual Resource Life Ins. Co., 31 S.Ct. 127 (1910); Connecticut Mutual Life v. Spradley, 19 S.Ct. 308 (1899) and Perkins v. Benguet Mining Co., 72 S.Ct. 413 (1952). By granting certiorari the

Court will not only be clarifying this important area of the law but will be resolving a seeming conflict among the circuit and federal courts, specifically the conflict between the Panel Majority of the Fifth Circuit decision in this case and Gutierrez v. Raymond Intern. Inc., 484 F.Supp. 241 (S.D. Tex., Hou. Div., 1979), on the one hand, holding that GTO would not be subject to the in personam jurisdiction of the Texas courts solely because it had been formally registered to do business in Texas at the time of the accident, and, on the other hand, the combination of these authorities: Connecticut Mut. Life Ins. Co. v. Spratley, and Perkins v. Benquet, (holding the federal constitution does not preclude Texas from imposing jurisdiction over a corporation such as GTO for causes of action not connected with its activities in Texas); Schlobohm v. Schapiro, 784 S.W.2d 355 (Tex. 1990) (holding the Texas Long-Arm Statute extends to the maximum limits permitted by federal due process); Texas law on corporate registration and cessation of registration, as

expressed e.g. in Art. 1396-8.13, Tex. R.C.S. (providing that a corporation that withdraws registration in Texas remains liable for debts or liabilities incurred while registered); Dalton v. Allied Van Lines, Inc, 900 F.2d 1196 (8th Cir. 1990) (holding that it is constitutional for a state to acquire personal jurisdiction over registered foreign corporations for a cause of action even though it did not arise out of corporation's activities within the state); 28 U.S.C. § 1359 (prevents parties from enlarging federal jurisdiction with actions after a cause of action arises); Deveck v. Japan CBM Corp., 877 F.2d 469 (2nd Cir. 1976) and Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469 (2nd Cir. 1976) (holding that 28 U.S.C. § 1359 creates presumption that actions of party claiming federal jurisdiction after cause of action arises are collusively done to create diversity). All of these authorities point toward the conclusion that Texas constitutionally can and does impose in personam jurisdiction over a corporation for causes of action arising while it is formally

registered to do business in Texas, even though it terminated its registration prior to suit and even though the cause of action may not have any direct connection with the activities of the corporation in Texas.

5) Whether the Court should grant certiorari with regard to the action of the district court and the Panel Majority of the Fifth Circuit in completely disregarding the affidavit of John Runion? While the affidavit did contain irrelevant legal conclusions, it also contained factual statements based upon personal knowledge and factual opinions which were supported by his knowledge and experience in dealing with the CMC Respondents and other maritime multi-nationals. Such affidavit in itself created a prima facie case of in personam jurisdiction over CMI, SATOL and GTO or, at the very least, the affidavit, when considered with the deposition testimony of the Respondents' own officers, surely created the "possibility" that a Texas state court could find personal jurisdiction over CMI, GTO and/or SATOL. Should

the Court grant certiorari on this issue, it would not only be addressing the important and fundamental issue of the right of parties to have their evidence considered but it would be resolving the conflict between the decision of the Fifth Circuit Panel Majority in this case, holding that the affidavit should be disregarded, and such Circuit Court decisions as Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 545 (1984); Payton v. Abbott Labs, 780 F.2d 147, 155-56 (1st Cir. 1985) and In Re Japanese Electronic Products, 723 F.2d 238 (3rd Cir. 1983) and earlier Fifth Circuit decisions such as Poteet v. Dow Chemical Co., 868 F.2d 1428 (5th Cir. 1989); Osbourn v. Anchor Laboratories, Inc., 825 F.2d 908, 915, 916 (5th Cir. 1987) and Christopherson v. Allied - Signal Corp., 939 F.2d 1106, 1110 (5th Cir. en banc 1991), all indicating that an affidavit such as Mr. Runion's should be considered and that the courts below should not have stricken it.

6) Whether in this case – where Crowley

Maritime Corporation ("CMC"), an American multi-national based in California, was parent of three wholly or partially owned foreign subsidiaries, Crowley Maritime International, Inc. ("CMI"), GTO and Saudi Arabian Transportation Offshore Limited ("SATOL"); it was undisputed (by testimony of Respondents' own witnesses) that CMC's officers and personnel held almost all of the managerial positions in CMI, GTO and SATOL, including those involving the day-to-day activities of the lighterage operation in Saudi Arabia, the operation in which Mr. Villar was working when he drowned; where, as Mr. Runion stated by affidavit, CMC's worldwide activities through subsidiaries, including its lighterage operation in Saudi Arabia, were highly centralized and dominated by CMC; where the fact that CMC's foreign subsidiaries are so dominated by CMC that they are the alter ego business conduit of CMC had already been determined by another Texas court in a case involving CMC, and that judgment had become final after CMC had had more than an adequate opportunity to present its side of the

case; where it is further undisputed that, shortly after the accident in question, CMC bought out the other two joint-venture partners in GTO, changed the name to WTO, WTO became the wholly-owned subsidiary of CMC, the lighterage operation in Saudi Arabia was shut down, SATOL was terminated as an active entity and almost all of the assets of the CMC/GTO/SATOL operation were transferred to CMC; where a prima facie case clearly exists with regard to CMC's domination of SATOL, GTO and CMI, to the extent that the presence of CMC in Texas (CMC has been formally registered in Texas at all material times, since before 1977, when the accident occurred, to and through the present) constitutes, through alter ego and/or agency principles and/or through the concept of joint contacts with Texas, the presence of SATOL, GTO and CMI in Texas for in personam jurisdiction purposes – the Supreme Court should grant writ of certiorari in order to clarify this important area of in personam jurisdiction/fraudulent joinder law and determine whether the foregoing undisputed facts and

circumstances compel the conclusion that there was at least a "possibility" that a Texas state court could find in personam jurisdiction as to either SATOL, GTO or CMI, thus defeating Respondents' claim of fraudulent joinder? In granting certiorari on this question, the Court would also be resolving conflicts between the decision of the Court of Appeals in this case, holding that such facts and circumstances do not even create the "possibility" that the state court could find in personam jurisdiction against SATOL, GTO or CMI, and the combined effect of the decisions in Product Promotion Inc. v. Cousteau, 455 F.2d 483 (5th Cir. 1974); Reul v. Sahara Hotel, 372 F.Supp. 995 (S.D. Tex. 1974); Castleberry v. Branscum, 721 F.2d 270 (Tex. 1986); Hargrove v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983); Gentry v. Credit Plan of Houston, 528 S.W.2d 571 (Tex. 1985); Torregrossa v. Szek, 603 S.W.2d 803 (Tex. 1980); Rittenhouse v. Mabry, 832 F.2d 380 (5th Cir. 1987); Hitt v. Nissan Motor Co. Ltd, 399 F.Supp. 838 (S.D. Flo. 1975); Beecham v. Pippin, 868 S.W.2d 356 (Tex.

App.—Austin 1985), no writ); Wells Fargo & Co. v. Wells Fargo Corp. Co., 556 F.2d 406, 419 (9th Cir. 1977); Cabalcetta v. Standard Fruit, 883 F.2d 1553 (11th Cir. 1989); Dudley v. Smith, 804 F.2d 979 (5th Cir. 1975); I.A.M. National Pension Fund Benefit Plan v. Wakefield Industrial Inc., 699 F.2d 1254 (D.C. App. 983); Cavic v. Ground Ball Bahama Dev. Co., 701 F.2d 879 (11th Cir. 1983); Stanley v. Globemaster, Inc. 400 F.Supp 1325 (D.C. Mass 1975); Koupetoris v. Konkor Intrepid Corp., 402 F.Supp. 951 (D.C. N.Y. 1975), aff'd, 535 F.2d 1392 (2nd Cir.); Bamford v. Hobbs, 569 F.Supp. 160 (S.D. Tex., Hou., 1983); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F.Supp. 483 (D. Kan 1978); Marsh v. Kitchen, 480 F.2d 1270 (2d Cir. 1973); U.S. v. Montreal Trust Co, 358 F.2d 239 (2nd Cir. 1966); Quarles v. Fuquels Industries, Inc., 504 F.2d 1358 (10th Cir. 1974); Harris v. Derre and Co., 223 F.2d 161 (4th Cir. 1955); Maritime Transport. Overseas v. Saudi Arabia Res. & Dev., 507 F.Supp. 701 (S.D. Tex. Hou. Div. 1981); Zwick v. Recvo Drug Store, 580 F.Supp. 64 (W.D. Pa. 1984); and American

General Fire & Cas. Co. v. Wal-Mart, 791 F.Supp. 763 (W.D. Ark. 1992), all holding or suggesting that an entity that is legally present and/or registered in the state can subject a foreign entity with which it has a relationship (e.g. parent, subsidiary, agent or principal), to the in personam jurisdiction of the court by virtue of such theories as alter ego and/or agency or quasi-agency and/or joint contacts.

7) Whether the undisputed fact that vessels of the alien Defendant Fednav sailed in and out of the Texas ports created at least the "possibility" that Fednav could be found by a Texas state court to be subject to its in personam jurisdiction. In granting certiorari the Court would be resolving the apparent conflict between the holding of the Fifth Circuit Panel Majority in this case – that shipping contacts with the state do not even present the "possibility" of in personam jurisdiction – and cases such as Szabo v. Smedvig Tankredri, 95 F.Supp. 519 (S.D. N.Y. 1951) and Allenque v. Gulf and So. America S.S. Co., 103

F.Supp. 34 (S.D. N.Y. 1952), implying that shipping contacts such as these would create at least a possibility of in personam jurisdiction.

II.

Whether, in a case such as this one, where the Plaintiffs have filed suit in the state court and the defendants have removed the case to federal court by asserting that the federal court had diversity jurisdiction, but, once the case has been removed, the defendants immediately ask the federal court to decline such jurisdiction and dismiss the case on ground of forum non conveniens, the federal district court, if it decides it should decline jurisdiction on such ground, should remand to the state court, rather than dismissing the case? The Court, if it grants certiorari on this question, would be resolving conflicts among the federal courts and other authorities. See Murray v. Union Pac. Ry. Co., 77 F.Supp. 613 (D.C. Ill. 1948); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); 76 C.J.S. Removal of Cases, § 266; 1A Moore's Federal Practice, Removal Procedure, § 0.169[1]

pp. 684, 685; and the analogous "pendant jurisdiction" cases, e.g. Carnegie-Mellon v. Cohill, 108 S. Ct. 614, 621-22 (1988), all pointing toward the view that the court should remand instead of dismissing, and Nolan v. Boeing, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 111 S.Ct. 1587 (1991); Bano Bi v. Union Carbide Corp., 984 F.2d 582 (2nd Cir. 1993), cert. denied, — S.Ct. — (1993); De Aquilar v. Boeing, 806 F.Supp. 139 (E.D. Tex. 1992) (pending appeal No. 92-5099 in the Fifth Circuit), and the Panel Majority in this case, holding that the court should dismiss rather than remanding.

III.

Whether the Supreme Court should grant certiorari with regard to the forum non conveniens dismissal in order to determine the important question, which has long been pretermitted by this Court, see Gulf Oil v. Gilbert, 67 S. Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 262 (1981), of whether, under Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938), the federal

court should, in a diversity case, apply state forum non conveniens law where the application of federal forum non conveniens law would make a difference in the outcome? In connection with this issue, certiorari is appropriate in order to achieve a uniformity of decisions in the federal courts by resolving the conflict between the Second Circuit opinion of Judge Learned Hand in Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), holding that state forum non conveniens law should be applied by the federal courts under these circumstances, and the Fifth Circuit decisions of the Panel Majority in this case and the full Court in In re Aircrash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, reinst. save as to dams., 883 F.2d 17 (5th Cir. 1989); and the Eleventh Circuit decision in Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), holding that federal forum non conveniens law should apply under these circumstances.

IV.

Whether, even if federal forum non conveniens law were deemed to apply, it is time for the Supreme Court to reexamine the forum non conveniens doctrine in the light of the facts of this case and the realities of the present world; to resolve conflicts and bring about a uniformity of decisions among the federal courts; to ascertain whether the doctrine has been applied discriminatorily; and to determine whether the lower federal courts have carried the doctrine far beyond the concepts originally intended by this Court? In order to carry out such reexamination, the Court would be resolving the following important issues: 1) Whether a forum non conveniens dismissal in this case, by the California federal court over nine years ago, constitutes res judicata or collateral estoppel as to that issue in this case where the Respondents, who had the burden on the issue, did not offer one scintilla of evidence as to whether the circumstances relevant to the issues – such as the location of the witnesses and proof – are

the same as ~~they~~ were nine years ago, and the Petitioners, who wanted to develop the record on such issues, were not permitted to engage in any discovery; where there is proof in the record indicating that there are now more witnesses and proof in or near the U.S. than any other country; and where the federal court in California did not address the question of whether a forum non conveniens dismissal would be appropriate under Texas state forum non conveniens law?

2) Whether, in view of Piper v. Reyno, 102 S. Ct. 252 (1981), which held that stipulations are relevant to the forum non conveniens determination, the courts below erred in ignoring, as they did, the stipulations tendered by Petitioners to the effect that: Petitioners would, at their own expense, bring Ms. Villar and her children to the U.S. for depositions and examination by American-based psychologists and experts of Respondents' choice; that Petitioners would use only American liability and damages experts, easily available for depositions and trial in the U.S.; and

Petitioners would pay the expenses of counsel for the Respondents to go to the Philippines or Saudi Arabia to take any depositions of relevant witnesses located there (of which there are probably none)?

3) Whether it is an abuse of discretion for the courts below to have granted and affirmed a dismissal on ground of forum non conveniens in a case such as this one, where the enterprise in the foreign country (Saudi Arabia) which gave rise to the accident in question has been discontinued; most, if not virtually all of the relevant witnesses have left Saudi Arabia; the vessels on which the accident occurred have long since departed, along with their crew; most of the witnesses, being Americans, are now located in the U.S.; the others, such as members of the crew, are apparently located with the primary vessel in the Gulf of Mexico, a lot closer to Texas than to Saudi Arabia; there are no witnesses in the Philippines except the Petitioners, who have volunteered to come, at their own expense, to the U.S. for both

depositions and trial; the Respondents offered absolutely no evidence with regard to the question of convenience and the present location of the witnesses; and thus the only evidence in the record at the time of filing and/or determination of the present motion overwhelmingly establishes that it is much more convenient for this case to be tried in the U.S. than in Saudi Arabia or the Philippines where there are virtually no witnesses or evidence at all?

4) And whether, in view of the actual effect of the forum non conveniens doctrine in today's world – its outcome determinative impact, as discussed by Justice Doggett in his concurring opinion in Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 680-89 (Tex. 1990); the realities of modern travel, communications, faxes, telephone depositions and the general use of depositions and discovery in international cases; the adverse impact upon safety that the application of the forum non conveniens doctrine has (by effectively immunizing American multi-nationals from

liability for injury to, or death of, their foreign workers or victims, the consequence is a lowering of global safety standards); the xenophobic and discriminatory consequences of the doctrine's application; the public interest need to monitor and regulate, through the American courts, the conduct of the American multinationals around the world; and the ultimate fact of life that the American forum, with its contingent fees, jury trials, modern discovery procedures and fair liability and damages laws, is really the only jurisdiction able to handle a truly international case in a just way — it would be propitious for the Court to reexamine the doctrine and, we submit, substantially narrow and clarify its application?

V.

Whether — in view of the importance of the issue of Rule 11 sanctions and its potential to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories", and the need to resolve conflicts among the circuit courts, in particular the decision of the Panel Majority of

the Court of Appeals in this case, holding that, even though every position taken by counsel for Petitioners was either supported by Fifth Circuit and/or Supreme Court law or the Supreme Court had not yet decided the issue and opinions of other courts supported the Petitioners' positions, it would nevertheless severely sanction Petitioners' counsel in the amount of $51,747.53 and decisions such as Thomas v. Capital Sec. Serv. Inc, 836 F.2d 866 (5th Cir. 1988) (en banc); Smith v. Our Lady of the Lake Hospital, Inc., 960 F.2d 439 (5th Cir. 1992); Cooter & Gel v. Harmarks, 110 S.Ct. 2447, 2457-58 (1990); Mareno v. Rowe, 910 F.2d 1043 (2nd Cir. 1990); Davis v. Carl, 906 F.2d 533 (11th Cir. 1990); Westlake North Property Owners v. Thousand Oaks, 915 F.2d 1301, 1307 (9th Cir. 1990); Teamsters Local Union No. 430 v. Cement Express Inc., 841 F.2d 66 (3rd Cir. 1988); U.S. Industries Inc. v. Touche Ross Co., 854 F.2d 1223 (10th Cir., 1988); and Schaefer v. Transportation Media Inc., 859 F.2d 1251 (7th Cir. 1988), all holding that, in situations reasonably similar to those that exist in this

case, sanctions would not be proper because the positions taken by counsel were "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" — this case is an appropriate one for the grant of writ of certiorari?

INTERESTED PARTIES

Nenita S. Villar, Petitioner

Josephine Villar, Petitioner

Gerardo Villar, Petitioner

Reynaldo Villar, Petitioner

Renerio Villar, Petitioner

John O'Quinn, Attorney for Petitioner

Benton Musslewhite, Attorney for Petitioner

Gary Riebschlager, Attorney for Petitioner

Crowley Maritime Corporation, Respondent

GTO Corporation, n/k/a WTO Corporation, Respondent

Genstar Corporation, Respondent

Fednav Ltd., Successor in Interest by Merger to Federal Commerce & Navigation Ltd., Respondent

Federal Pacific Ltd., Respondent

Ross Insurance Limited, Successor In Interest to Genstar Overseas, Limited, Respondent

Saudi Arabian Transport Organization Ltd., Respondent

Jack L. Allbritton, Attorney for Respondents

Fulbright & Jaworski, Attorneys for
Respondents

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the federal district court, dated January 7, 1992, is attached as App. A, A-1 to A-87, see also, 790 F.Supp. 1467 (S.D. Tex. 1992).

2. The opinion of the Court of Appeals, dated May 25, 1993, is attached as App. B, A-88 to A-144, see also, 990 F.2d. 1489 (5th Cir. 1993).

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals was entered on May 25, 1993. A petition for rehearing and rehearing en banc was timely filed and was overruled on June 30, 1993. App. C, A145-47). This petition for writ of certiorari has been timely transmitted within ninety days of the order overruling the motion for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of 28 U.S.C. §§ 1441, 1446 and 1447, the removal/remand statues; Section 17.044 of the Texas Civil Practice and Remedies Code; Section 71.031 of the Texas Civil Practice and Remedies Code, (the "Open Forum Statute"); 28 U.S.C. § 1359; and

TEX. REV. CIV. STAT. 1396-8.13 and 8.13 (7).

I. Statement of the Case

A. Course of Proceedings and Disposition in Court Below.

In March of 1977, the decedent, Renerio Z. Villar, a seaman aboard the Tug Bannock, was ordered by his captain to board Barge 204 to secure the barge to its buoy mooring line, from which it had broken loose. Having been provided with no safety line, he fell into the sea while trying to secure the barge and tragically drowned, leaving a widow and four children.

The Tug Bannock was "dedicated" to a Liberian corporation, then called GTO Corporation

("GTO"), which was then one-third owned but almost totally controlled by a Delaware corporation called Crowley Maritime Corporation ("CMC") and its wholly-owned subsidiary Crowley Maritime International, S.A., a Panamanian corporation ("CMI"). GTO and CMI shared home offices with CMC at One Market Place, San Francisco, California; their officers and boards were interlocked; GTO and CMI were "corporations of convenience," in that they maintained no operating offices at the places of their registration, Liberia and Panama, but instead were operated by CMC out of San Francisco and its other offices (one of which was in Texas) and the key management positions in GTO and CMI were occupied by CMC people.

GTO owned the controlling interest in a company called Saudi Arabia Transport Organization Limited ("SATOL"), which conducted a lighterage operation in the Persian Gulf, off the coast of Saudi Arabia. The Tug Bannock and Barge 204 were involved in this lighterage operation at the time of Mr. Villar's drowning.

Again, almost all of the key management positions in SATOL were occupied by CMC people, right on down to those in charge of the day-to-day activities.

While the Tug Bannock carried a Panamanian flag, it is undisputed that it was a "flag of convenience" and that the de facto flag of the Bannock was that of the United States. Barge 204 was directly owned by CMC and carried the American flag. Mr. Villar was nominally employed by P.A.C. International, S.A. ("PACI"), a Panamanian corporation based in Singapore used to provide maritime personnel for the lighterage operation. Mr. Villar's contract provided, if injured or killed, that he or his survivors could recover under the law of the Philippines or the law of the flag of the vessel, whichever would be more beneficial to Mr. Villar and his family.

The Villars first filed suit in the United States District Court in San Francisco. That court found that U.S. maritime law did not apply and dismissed the case on ground of forum non conveniens. The Ninth Circuit affirmed, 782 F.2d

1478 (9th Cir. 1986), and, in doing so, held that American law did not apply, but did not determine which foreign law would apply. 782 F.2d at 1482. The Villars then filed suit in the state court of California and that court dismissed on ground of forum non conveniens and such dismissal was affirmed by the California state court of appeals, primarily on the ground that the state court should decide the forum non conveniens issue as the federal court had decided it, indicating that California state and federal criteria were generally the same. See Ex. C to Motion to Dismiss of CMC; Record in Court of Appeals ["R."] at 76.

The Villars thereafter timely filed suit in the state court of Texas. The Villars sued CMC, CMI, GTO, SATOL and four other foreign corporations. One of the other four was Fednav Ltd. ("Fednav"). The defendants frivolously removed the case to federal court. App. D and E, A148-60; R. at 31-24. The removal was based upon one ground, diversity of citizenship, and, though implicitly acknowledging that the presence of any

one of the seven alien defendants would preclude removal (plaintiffs also being aliens), see Chick Kam Choo v. Exxon, 764 F.2d 1148 (5th Cir. 1985) ("Choo II") and Cabalcetta v. Standard Fruit, 883 F.2d 1553 (11th Cir. 1989), defendants sought to legitimize a removal that was patently improper by making the conclusory, unsupported assertion that "all of the co-defendants are alien corporations or companies, who have been fraudulently named as defendants in an attempt to defeat or destroy diversity jurisdiction." A154.

The plaintiffs quickly filed a Motion to Remand. R. 101-95. Citing Choo II, 764 F.2d at 1149, the plaintiffs observed that the presence of alien Plaintiffs versus just one alien defendant absolutely prohibited removal and then stated that defendants' assertion that every one of the alien defendants had been fraudulently joined was nothing more than a naked, conclusory, unsupported allegation that did not even come close to satisfying the defendants' heavy burden of "clearly proving" that there was "no possible way" that plaintiffs could establish in personam

jurisdiction over any one of the alien defendants in the state court. Id.

Plaintiffs also filed a supporting brief, (R. 148-113, and deposition excerpts, documents and an affidavit. R. 361-160 and see John Runion's affidavit, App. F, A161-191, discussed in detail below.) Essentially those filings establish that CMC had an office and registered agent for service of process in Texas at the time of the accident and at the time of the filing of this suit; GTO had an office and registered agent for service in Texas at the time of the accident; CMC had an agency and parent-subsidiary relationship with GTO, CMI and SATOL and the activities of CMC in Texas, as parent and agent of GTO, CMI and SATOL, were sufficient to establish a prima facie case of in personam jurisdiction in Texas over all three of said alien defendants (CMI, GTO and SATOL); and that the post-accident transfer of the assets of GTO, CMI and SATOL, the post-accident termination of those companies as active, viable businesses, the initial inadequacy of capitalization of GTO, CMI

and SATOL, and the general dominion and control exercised by CMC over GTO, CMI and SATOL, all demonstrated that, at the very least, defendants could not satisfy their heavy burden to "clearly show" that there was "no possible way" that the state court of Texas could have asserted in personam jurisdiction over GTO, CMI and/or SATOL by and through, or with, CMC.

The defendants filed a response brief and affidavits, deposition excerpts and documents. The deposition excerpts and documents were essentially the same as those filed by the plaintiffs and simply demonstrated that, in essence, the proof of general dominion and control exercised by CMC over CMI, GTO and SATOL is undisputed. The affidavits filed by defendants were conclusory and unhelpful, except for the affidavit of M. E. Chlumecky, discussing how the vessels of Fednav, one of the other four alien defendants, frequently sailed into Texas ports. See "Chlumecky Affidavit", Exhibit F to Defendants' Opposition and Response to Plaintiffs' Motion to Remand.

The alien defendants also filed a motion to dismiss their cases on the ground that the court had no in personam jurisdiction over them and CMC filed a motion to dismiss on ground of forum non conveniens. See R. at 64-50 and 94-91. Subject to their motion to remand to state court, the plaintiffs opposed these motions, R. 491-476, and expressly requested time to engage in discovery with respect to both motions.

The district court, erroneously ignoring plaintiffs' plea that it should first address the plaintiffs' motion to remand in the context of the appropriate removal/remand burdens and tests, first addressed the alien defendants' motion challenging in personam jurisdiction over all seven of the alien defendants and, instead of placing the heavy burden upon the defendants to clearly prove that there was "no possibility" that a state court could find in personam jurisdiction as to any one of the seven alien defendants, as it should have done, the court shifted the burden to the plaintiffs to produce prima facie or preponderance of the evidence

proof of in personam jurisdiction as to the alien defendants. A-10-23, 55-56; 780 F.Supp. at 1472-1474, 1481. As to plaintiffs request that the court delay a decision on such motion so that plaintiffs could engage in discovery upon all issues pertaining to the pending motions, the district court callously refused to allow such discovery, even though it was undisputed that plaintiffs had engaged in no discovery in the prior proceedings in California or in the proceedings in the court below on the question of in personam jurisdiction in Texas or on the question of whether the present location of the witnesses and the proof made it more convenient at this time to try the case in the U.S. rather than in Saudi Arabia or Philippines. A47, 53; 780 F.Supp at 1480.

Therefore, the district court - refusing first to take up the question of remand and instead erroneously addressing the in personam jurisdiction motion first; applying the wrong burdens and tests; refusing to allow plaintiffs discovery with respect to the pending motions;

refusing to conduct an evidentiary hearing on such motions; and ignoring the fact that, even under in personam jurisdiction burdens and standards (instead of fraudulent joinder standards), the affidavit evidence and the deposition testimony from the California proceedings generated a prima facie case of in personam jurisdiction with respect to GTO, CMI, SATOL and/or Fednav - summarily and erroneously held that the court had no in personam jurisdiction over any of the foreign defendants, including GTO, CMI, SATOL and Fednav, and dismissed all of said defendants; then denied the motion to remand "as moot"; granted CMC's forum non conveniens motion; in violation of the Anti-Injunction statute, 28 U.S.C. § 2283, enjoined the plaintiffs from proceeding in any other American court; and, to top it off, sua sponte severely sanctioned the plaintiffs' lawyer. A-10 to 87; 780 F.Supp. at 1472-1487.

A Panel Majority of the Court of Appeals manifested an even more hostile attitude toward these foreign plaintiffs and their counsel. A-

88-129; 990 F.2d at 1489. The Panel Majority affirmed in all respects and, in affirming the in personam jurisdiction holding and sanctions, blatantly misconstrued Texas law. See discussion, infra, of comments of Court at A112, n. 8 and A127-128; 990 F.2d at 1496-97, n. 8 and 1500.

Judge Johnson of the Court of Appeals filed a vigorous dissent on the question of discovery, asserting that the district court's failure to give the plaintiffs the right to engage in discovery was contrary to "a host of . . . Fifth Circuit precedent" and to cases from other Circuits, and that the case should have been reversed and remanded to allow the plaintiffs their fundamental right to discovery. A130 to 140; 990 F.2d at 1500-03.

B. Evidence On In Personam Jurisdiction and Forum Non Conveniens Motions.

The key jurisdictional facts are really undisputed. The discussion of those "facts" by the district court, A38-A43, 780 F.Supp. 1478, 1479, erroneously consisted of an attempt to

glean from the depositions and record the evidence most favorable to the defendants while ignoring the overwhelming evidence in favor of the plaintiffs. This approach, of course, violated the district court's own later finding that plaintiffs failed "to make a prima facie showing that any of the Codefendants have continuous and systematic contacts with the State of Texas or that any of the Codefendants are the 'alter ego' of CMC." A56, 780 F.Supp. at 1481. Indeed, the district court's discussion often created misleading innuendos by its incomplete description of the evidence.[1] The rest of the district court's discussion of the "facts" was superficial – only touching upon the surface veneer of corporate appearances and not upon the substantive evidence underneath that surface.

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[1] For example, the district court stated that "(o)f course, CMC, through CMI, exercised some control over GTO, and through GTO, over SATOL, and some employees of both GTO and SATOL retained ties to CMC." A42, 780 F.2d at 1479. This is a gross understatement. As the statement of the undisputed facts herein reflect, all of the key managerial positions, both in San Francisco and Saudi Arabia, including those dealing with the day to day operations, were manned by CMC personnel. How the district court could say or imply otherwise is beyond our comprehension.

That substantive evidence consists of the deposition testimony of Dick Maguire, an American officer of CMC who had overall responsibility for the international group of CMC companies, including CMI, GTO and SATOL (Exh. I to Defendants' Opposition in Response to Plaintiffs' Motion to Remand, "Mag. Dep." at 7, 178, 19); George Watkins, American CMC officer who was, from his office in San Francisco, the key supervisor of the CMC/GTO/SATOL Saudi Arabian operation (Exh. J to Defendant's Opposition in Response to Plaintiff's Motion to Remand, "Wat. Dep." at 3 to 7); William D. McLean, another American CMC employee who was general manager of the CMC/GTO/SATOL operation in Saudi Arabia (Exh. K to Defendant's Opposition and Response to Plaintiffs' Motion to Remand, "McL Dep" at 5 to 8); and Rudolph Nazareth, head of PACI (Exh. L to Defendant's Opposition and Response to Plaintiffs' Motion to Remand, "Naz. Dep." at 10). In addition, the affidavit of John Runion, plaintiffs' factual expert (A161 to 191 and see Record for the attachments), was never

contradicted by defendants. The only additional relevant evidence produced by defendants was the Fednav affidavit. See Aff. of Chlumecky, supra.

These depositions and affidavits established the following undisputed facts:

1) That GTO was formally registered to do business in Houston, Texas and had an office in Houston at the time of the accident made the basis of this suit. (Mag. Dep. at 79; Runion Affidavit A 174 - 175).

2) That, after the accident in 1979, GTO was dissolved, terminated its registration in Texas and its name was changed to WTO; all of its assets and stock was acquired by CMC; and the GTO/SATOL operation in Saudi Arabia was completely shut down, with the personnel, vessels and other assets being moved out of Saudi Arabia. See Shipman affidavit filed on behalf of CMC companies, R. 365-363; Mag. Dep. 11-13, 47, 121-23; McL. Dep. 5, 81-83.

3) That the defendants offered no evidence to show that they complied with Texas statutes with regard to discontinuance of corporate

registration; no evidence was offered to show what happened to the assets and personnel in GTO's Houston office after it was shut down in 1979; and defendants offered no evidence to show that the discontinuance of the GTO registration and office was not done in order to create diversity, in violation of the rationale of 28 U.S.C. § 1359, in favor of its parent, CMC, in the event CMC were to be later sued in Texas. See entire record and discussion in footnote 15 infra.

4) That CMI, a wholly-owned subsidiary of CMC with an interlocking directorate, was a "corporation of convenience", with no operational office in Panama, its country of registration, but with its primary office in San Francisco, in the same office as CMC (One Market Place in San Francisco), Mag. Dep 8,9, and was incorporated with only $10,000 capitalization. Mag Dep. 108.

5) That GTO was also a "corporation of convenience" with no operating office in Liberia, its country of registration, and had its home office also at CMC's office, One Market Place in

San Francisco, Mag. Dep. 9, 22, and was incorporated with only $600 capitalization. Mag. Dep. 108, 109. As testified by Maguire, GTO was not really an operating company but a "paper company". Mag. Dep. 23, 24, 37, 38.

6) That SATOL, a Saudi Arabian corporation, was 60% owned by GTO and GTO was controlled by a joint venture agreement, R. 414-394, which provided for a Management Committee that was dominated by CMC people (such as Leo Coller).[2] Mag. Dep. 15-22. GTO controlled SATOL by appointing and controlling all but two of the nine person board of SATOL, Exh. 1 to Mag. Dep. and Mag. Dep. 43, and CMC appointed and controlled five of the nine positions on the GTO board (GTO had no officers). Mag. Dep. 26-31, Exh. 1 to Mag. Dep.

7) That PACI, while the nominal employer

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[2] Maguire testified as follows:

"Q. If you had to point to one man in the organization ... who would you say would be the key man?

A. Well, Leo Collar is the chief operating officer of Crowley; and flowing from his responsibilities there, when we're in anything, he's typically the chief man in whatever we're in."

of Mr. Villar, was not the de facto employer (the de facto employer was CMC/GTO/SATOL); PACI had no officers or supervisory personnel in Saudi Arabia; and PACI got the money to pay Mr. Villar and the crew from CMC/GTO/SATOL. Naz. Dep., R. 342-308; Wat. Dep. 34, 35 (PACI merely a "hiring-hall" company).[3]

8) That all of the key positions in the CMC/GTO/SATOL Saudi Arabian operation were held by CMC people: e.g. McLean was general director in Saudi Arabia, in charge of day-to-day operations, McL. Dep. 8; the general director's job, the key position in Saudi Arabia, was always held by a CMC person (in addition to McLean, George Tanner, George Seeley and Jack Mayor), Mag. Dep. 33, 35, 47, 52-54, 58, Wat. Dep. 29-33; John Pelton, a CMC American employee was in charge of financial matters, McL Dep. 16; purchasing was handled by a CMC American employee

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[3] Nazareth, in addition to the references above, testified that PACI is a Liberian company that officed in Singapore and was run by Americans, Solomon, Karscher and Donald Gordon (Dep. 13, 17, 18, 19); that Solomon is now in Los Angeles and Kascher is back in the U.S. (Dep. 20, 21); and, since 1980, PACI has been out of business (Dep. 14).

named Jerry Phillips, McL. Dep. 18; Vladimer Soloman, a CMC American employer, an operations manager, Cecil Payne, an American CMC employee, was also an operations manager and the port captain, Dave Hutton, also a CMC American employee, was the dispatcher of the vessels, and the captain of the Bannock was directly supervised by Solomon, Payne and Hutton. McL. Dep. 45-48, 54-57, 69, 96-103.

9) All of the essential corporate services for GTO and SATOL were furnished by CMC; these included "financial accounting - type direction", "assistance in recruiting individuals from the states", "financing for the operations", "advertising", supplies, sales, engineering, legal services, insurance and investigation services. Mag. Dep. 62, 65, 73-74, 78, 81, 95-96. McLean and others in Saudi Arabia coordinated day-to-day decisions with CMC people in San Francisco such as Collar and Watkins (via telex, telephone, mail, etc). McL. Dep. 13-14, 18.

10) The contract which governed the Saudi

Arabian lighterage operations was between SATOL and ARAMCO, the Saudi Arabian oil company dominated by four American oil companies (Chevron, Exxon and two others), and was negotiated by CMC employees McLean, Tanner, Watkins and Quinby, the latter being CMC's lawyer (based in San Francisco), Mag. Dep. 62-64; CMC ultimately received the proceeds from the contract and then forwarded money to Saudi Arabia to pay for operating expenses there. Mag. Dep. 47, 59-62, 66; McL Dep. 22, 29-32.

11) That the accident investigation was handled by CMC/GTO people out of the U.S. Mag. Dep. 95-97.

12) As to the location of the witnesses, Maguire testified that he did not know the nationality of the surviving crew but that the captain, Corpus, was a Vietnam refugee, Mag. Dep. 94-95; however, McLean testified that Tug Bannock and its crew were, as of the date of his deposition, working in the Gulf of Mexico, McL. Dep. 73, and all the other vessels used in the lighterage operation had been moved out of Saudi

Arabian waters. McL. 81-83.

13) John Runion, with personal knowledge as well as investigative knowledge, expressed the uncontradicted factual opinion that CMC, which maintained a highly centralized modus operandi, dominated CMI, GTO and SATOL to the extent that these subsidiaries were the alter-ego of CMC and vice-versa.

II. REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

A. Preliminary Statement.

This Court, we respectfully submit, should grant certiorari in order to deal with the ominous and growing use by American-based multi-national corporations of a judicial scenario that emasculates federalism, comity and traditional concepts of removal/remand law. They frivolously remove to federal court cases filed by foreign plaintiffs in the state court, and then prevail upon the lower federal courts to: address their dispositive motions <u>before</u> resolving the

plaintiffs' remand motion, thus drastically shifting the burdens upon the parties by the finesse of the remand motion, deny any right of discovery to the plaintiffs on such motions, improperly grant the dispositive motions; (such as an in personam jurisdiction motion); then deny or deem moot the remand motion; and ignore state forum non conveniens law and use federal forum non conveniens law to dismiss the case to oblivion.[4] This and other recent cases

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[4] We feel compelled to point out to the Court that we raised some of the same issues advanced in this Petition in Bano Bi v. Union Carbide, in which this Court recently denied certiorari. See action of S. Ct., Oct. 1993 (No. 93-64). While there are some similarities, we hasten to point out some very substantial differences in the two cases. We do not have, in this case, to contend with a statute and court-approved settlement adopted and entered in a foreign jurisdiction, that are potentially preclusive under the Act of State doctrine, as was the situation in Bano Bi. In this case, the evidence of contacts with the Texas forum by one or more of the alien defendants is far more conclusive than it was in Bano Bi. Indeed, the plaintiffs in Bano Bi had not had the fortuitous opportunity, as plaintiffs had in this case, to engage in discovery that produced evidence relevant to the questions of alter ego, agency and other grounds for having the registered parent constitute the presence of the alien subsidiaries for in personam jurisdiction purposes. In this case, see argument infra, it is absolutely clear – much more so than in Bano Bi – that defendants did not sustain their burden to "clearly prove" that there was "no possibility" that plaintiffs could prove in personam jurisdiction in the state court as to at least one of the seven alien defendants. To be sure, as we noted in the Statement of the Case above, in this case, unlike the Bano Bi case, one of the alien

demonstrate, we further suggest, an urgent need for the Court to comprehensively reexamine the forum non conveniens doctrine.

This case represents a real travesty. The district court, displaying injudicious animosity toward these foreign plaintiffs and their counsel, obviously resolved never to give plaintiffs a decent chance and then sanctioned their counsel for $52,747.53 for having the audacity to do his duty as an advocate to make every effort to obtain a trial on the merits in a venue that could provide real justice.

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defendants was indisputably registered to do business in Texas at the time of the accident made the basis of this suit. In this case, we are focusing one of our most urgent pleas for the grant of certiorari, see infra, on the basis of that issue, an issue not present in Bano Bi. And there was an issue in Bano Bi - not a viable one we said, but one that was raised by the defendants in that case nevertheless - that the plaintiffs waived the right to discovery, whereas in this case there is no issue at all about waiver. See dissent of Judge Johnson, A130 to 144, 990 F.2d at 1500 to 1503. Finally, as to the forum non conveniens issue, it was clear in Bano Bi that there were a number of relevant witnesses in India, both as to liability and damages, whereas in this case it is undisputed that there are no witnesses in Saudi Arabia where the accident occurred, and only the plaintiffs are in the Philippines and they have agreed to appear in the American Court for depositions and trial. The harshness and gross injustice of the application of the forum non conveniens doctrine is much more apparent in this case, than it was in Bano Bi.

B. The Fraudulent Joinder Removal.

1. The Tests and Burdens and Addressing The In Personam Jurisdiction First.

A very important question before the Court is whether or not it is going to reject the "no possibility" rule or adopt it as the firm law of the Court in fraudulent joinder cases.

In 1921 the Court, in Wilson v. Republic Steel, 42 S.Ct. 35 (1921), framed the test and burden in fraudulent joinder cases in these terms: fraudulent joinder must be shown by the removing party by "facts rightly leading to that conclusion (that joinder was fraudulent) apart from the pleader's deductions". The Fifth Circuit, up until this case, took the lead in further refining the tests and burdens in fraudulent joinder cases, stating in Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983) that:

> The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional

> facts. . . Having assumed that all other facts alleged by the plaintiff in this complaint are true, the court must then examine relevant state law and resolve all uncertainties in favor of the nonremoving party. Id. at 550. Viewing the state law in its proper perspective, if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, and that there is incomplete diversity, and that the case must be remanded to the state courts.

707 F.2d at 209; emphasis ours.[5]

But the district court in this case finessed the "no possibility" burden and test by deciding the in personam jurisdiction motion before addressing the remand motion, thus shifting the burden of proof to the Petitioners to prove a prima facie case with respect to in personam jurisdiction. A11-20; A55-57, 780

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[5] See also, East Texas Mack Sales v. Northwest Accept. Corp., 819 F.2d 116 (5th Cir. 1987); B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); and Laughlin v. Prudential Ins. Co., 882 F.2d 187 (5th Cir. 1989). Other circuits have also imposed a similar heavy burden upon the removing parties in fraudulent joinder cases. See, e.g. Polous v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992).

F.Supp. at 1473-74, 1481.[6] Mentioning Allen v. Ferguson, 791 F.2d, 611 (7th Cir. 1986) only in a footnote, n. 8 at A18 and 780 F.Supp at 1474, the district court based its holding upon the perplexing comment that "judicial economy favors deciding the Motion to Dismiss at the outset" and then revealed that it had employed a flawed rationale: it stated that if it remanded the case to state court, let the state court decide the in personam jurisdiction motion and the state court thence granted the motion as to all seven foreign defendants, "CMC, the remaining diverse

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[6] The "finesse" by the district court is revealed in the following language:

> On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the initial burden of establishing that jurisdiction exists. Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir. 1988); Nolan v. Boeing Co., supra, 736 F.Supp. at 127. Plaintiffs have failed to make a prima facie showing that any of the Codefendants have continuous and systematic contacts with the State of Texas or that any of the Codefendants are the 'alter ego' of CMC. Therefore, the Court finds that it cannot exercise personal jurisdiction over any of the Codefendants. The Codefendants' Motion to Dismiss is therefore GRANTED. With the departure of the Codefendants, complete diversity now exists between the Plaintiffs and CMC, the remaining Defendant. Therefore, the Plaintiffs' Motion to Remand is DISMISSED AS MOOT.

780 F.Supp. at 1481.

defendant, will, under applicable Fifth Circuit law, be unable to remove to this Court". 780 F.Supp. at 1474.[7]

The extremely disturbing aspect of that view, is not only that it may very well be based upon a totally erroneous rationale, but is one that clearly exceeds the traditional limits upon

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[7] The district court forgot to mention the "fraudulent joinder exception" to the "voluntary - involuntary rule". It is true that the provision of 28 U.S.C. 1446(b), allowing a removal thirty days after a party who would destroy diversity has been dismissed by the state court, has been construed to apply only to voluntary dismissals by the plaintiff, and not to dismissals brought on by actions of the defendant or by an involuntary ruling of the court. The fountainheads of the voluntary-involuntary doctrine are two decisions of this Court, Powers v. Chesapeake and O.Ry., 18 S.Ct. 264 (1898) and Whitcomb v. Smithson, 20 S.Ct. 248 (1900). However, as noted by the Fifth Circuit in Self v. General Motors Corp., 588 F.2d 655, 662 (5th Cir. 1978), these cases do not clearly "elucidate the contours of the doctrine." Moreover, an exception has developed which holds that where there has been a fraudulent joinder and the state court subsequently dismisses the defendant who destroys diversity, the remaining diverse defendant can then remove under section 1446(b). See Insigna v. LaBella, 845 F.2d 249, 254, 255 (11th Cir. 1988); Self DeBry v. Transamerica Corp., 601 F.2d 480 (10th Cir. 1979); and Poulos v. Naas Foods Inc., 959 F.2d 69 (7th Cir. 1992). While it is true that a number of cases do not recognize the fraudulent joinder exception, see, e.g. Katz v. Armatori, SPA, 718 F.Supp. 1508 (S.D. Fla. 1989) and Nolan v. Boeing, 736 F.Supp. 120, 123 (E.D. La. 1990), these conflicting cases, and the uncertainty that prevails with regard to this issue, simply demonstrate another reason why the Court should intervene in this case.

removal jurisdiction[8] and completely disregards the principles of federalism and comity.

In any event, the holding by the district court and the Panel Majority of the Fifth Circuit – see A88 to A144, 990 F.2d at 1489 to 1503, that the courts can finesse the heavy burden upon the removing parties to prove fraudulent joinder, by deciding the in personam jurisdiction motion first, is directly contrary to Allen v. Ferguson. The court in Allen stated:

> When a suit is removed on the basis of diversity of citizenship, the district court should verify the essence of the subject-matter jurisdiction at the outset of the litigation if it appears that complete diversity is lacking.

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[8] This Court stated in Shamrock Oil & Gas v. Sheets, 61 S.Ct. 868, 872 (1941):

> [T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such (removal) legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'

791 F.2d at 615-16 (emphasis ours). Noting that "federalism concerns tip the scales in favor of initially ruling on the motion to remand", the court then held that "the district court erred in deciding Ferguson's motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity." Id. at 615, 616. See also, Buyout v. Auto Club Ins. Assn., 704 F.Supp. 1060 (N.D., Ga., 1989) (citing and adopting Allen v. Ferguson) and Armstrong v. Alabama Power Co., 667 F.2d 1385, 1388 (11th Cir. 1982).[9] We urge the Court to intervene and

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[9] In a very articulate statement of the rationale for the holding in Allen v. Ferguson, the court in Armstrong stated:

> "The answer lies in the nature of removal jurisdiction – which is simply a method of transferring into federal court a state court suit containing a federal jurisdictional ground. It also lies in the balance between federal and state judicial power – a balance that requires the federal courts to give '(d)ue regard for the rightful independence of state governments' and to 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Romero v. International Terminal Operating Company, Supra, 358 U.S. at 380, 79 S.Ct. at 484, 3 L.Ed.2d at 386. Finally, it preserves the plaintiff's right to choose a state forum. To serve these purposes, the federal courts must carefully scrutinize the bounds of removal jurisdiction, even to the point of apparently impractical detail – for these details in the given case eventually guarantee higher goals in

resolve the conflict between the Seventh and Fifth Circuits on this important issue and hold clearly and unequivocally that, as held in Allen, a district court must always address the motion to remand first and determine whether it has subject matter jurisdiction.

Furthermore, it has been many years since this Court has specifically examined the law with respect to "fraudulent joinder". We respectfully urge the Court to grant certiorari in order to clarify whether the burden upon the removing parties is, and should always be, regardless of other pending motions, the "no possibility" rule in connection with removals based upon alleged "fraudulent joinders."

2. The Failure to Grant Discovery.

By coupling the finessing of the "no possibility" burden with the denial of discovery

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all cases."

667 F.2d 16 1388. See also, BancOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975); and Jones Store Co. v. Hammon, 424 F.Supp. 494, 499 (W.D. Mo. 1977). "The first order of business is for the federal court to determine its own jurisdiction". 1A Moore's Federal Practice, §0.129 [1] pp. 678, 679.

on the part of the Petitioners, the courts below, in a very brutal fashion, placed a virtually impossible, and possibly unconstitutional, barrier in the Petitioners' path. Most disturbing, in doing what they did, the courts below have, in violation of federalism and comity, essentially robbed the state courts of their lawful jurisdiction.

The dissent in the Court of Appeals in this case articulates better than we ever could, the need for certiorari with regard to the denial of discovery. See A130 to 144; 990 F.2d at 1500-03. Judge Johnson completely sweeps away the superficial rationalizations of the Panel Majority, particularly the claim that Petitioners should not be entitled to discovery in this case because of the discovery ten years earlier in the California litigation on the forum non conveniens motion pending in the California Court.[10]

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[10] Judge Johnson stated:

> The majority opinion states that '[t]he Villars also contend that the district court erred when it denied them additional discovery.' A130-131 and 990 F.2d at 1500. However, the record, the briefs, the district court's opinion and counsel

What is really important about Judge Johnson's dissent, however, is how he elucidates that the Panel Majority's affirmation of the district court's denial of discovery is squarely in conflict with decisions of the 1st, D.C., 11th, 4th and 3rd Circuits.[11]

Therefore, we urge the Court to grant certiorari and stem the recent rising tide of cases in which the courts have used a denial of discovery with a shift in burdens as instruments for preventing foreign plaintiffs from having access to the state courts and, further, to

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> for the parties themselves, all acknowledge that there has been absolutely no discovery in the case sub judice. While it is true that the parties engaged in discovery with respect to a forum non conveniens issue ten years ago in a California case, it is quite elementary that personal jurisdiction analysis and forum non conveniens analysis are completely different.

[11] Judge Johnson cited the following cases: Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 681 (1st Cir. 1992); Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991); Crane v. Carr, 814 F.2d 758 (D.C. Cir. 1987); Eaton v. Dorchester Development, Inc., 692 F.2d 727, 729 (11th Cir. 1982); Wells Fargo and Co. v. Wells Fargo Express Co., 556 F.2d 406, 431 n. 24 (9th Cir. 1977); Lakkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971); Fraley v. Chesapeake and Ohio Ry Co., 397 F.2d 1, 3, (3d Cir. 1968); Surpitski v. Hughes-Kennan Corp., 362 F.2d 254, 255 (1st Cir. 1966). 990 F.2d at 1502, n. 5.

resolve the conflict between the Panel Majority of the Fifth Circuit in this case, on the one hand, and the 1st, D.C., 11th, 4th and 3rd Circuits, on the other hand.

3. GTO's Formal Registration In Texas.

In Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S.Ct. 308 (1899), the defendant insurance company was formally registered, through the Tennessee Insurance Commission, to do business in Tennessee. During the time it was registered, it sold the subject policy of insurance but, after the policy was sold, the defendant withdrew from doing business in Tennessee. After such withdrawal, plaintiff filed suit on the policy against the defendant in Tennessee and the Court held that the defendant was subject to the in personam jurisdiction of the Tennessee Courts.[12]

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[12] See also, Mutual Reserve Fund Life Assoc. v. Phelps, 190 U.S. 147, 23 S.Ct. 707; Mutual Reserve Life Ins. Co. v. Birch, 200 U.S. 612, 26 S.Ct. 752 and Commercial Mut. Accid. Co. v. Davis, 213 U.S. 245, 29 S.Ct. 445. But see, Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573, 31 S.Ct. 127, 131-32 (1910), indicating that the cause of action may have to arise out of the business being done in the state.

Then, in Perkins v. Benguet Mining Co., 342 U.S. 437, 72 S.Ct. 413 (1952), the Court held that the due process clause of the 14th Amendment did not preclude Ohio from subjecting a foreign corporation to in personam jurisdiction in a case brought by an Ohio nonresident concerning matters unrelated to defendant's activities in Ohio.[13]

The decision in Hunter was cited as authority for the holding of the court in Gutierrez v. Raymond International Inc., 484 F.Supp. 241 (S.D. Tex. Hou. Div. 1979) to the effect that the court did not have in personam jurisdiction over an unlicensed foreign corporation in order to adjudicate liability of its foreign subsidiary arising out of acts unrelated to any business transacted in the forum state. The court in Gutierrez did concede that the holding in Perkins v. Benguet may have "eroded" the Hunter decision. 424 F. Supp. at

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[13] See also, State of Washington v. Superior Court, 53 S.Ct. 624 (1933) (holding that it is constitutional for a state to make the secretary of state the agent for a corporation after it withdraws from formal registration in the state or has had that registration terminated).

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Texas is a state which provides for assertion of in personam jurisdiction to the outer limits of constitutional due process. Schlobohm v. Shapiro, 784 S.W.2d 355, 357 (Tex. 1990). Article 1396-8.13 (7) of the Texas Statutes provides that, where corporations withdraw their formal registration, they can only do so subject to paying or providing for "all known creditors or claimants". In addition, Sect. 17.044(a) of Chapter 17 of the Texas Civil Practice and Remedies Code provides that "the secretary of state" of Texas shall be deemed the agent of a non-resident who "becomes a non-resident after a cause of action arises in this state but before the cause is matured by suit in a court of competent jurisdiction". The net effect of these provisions is, under Texas law, to render GTO subject to the in personam jurisdiction of the Texas courts for causes of action arising while it was formally registered to do business in Texas, thus creating a potential "debt", even though suit was not filed

until after GTO terminated its formal registration in Texas.[14]

Unfortunately, since the district court in this case refused to allow discovery, while there are strong indications that the accident in Saudi Arabia had some connection with the ARAMCO/GTO/CMC dealings in Texas, there is nothing in the record on the question of whether such accident did in fact have some connection with GTO's activities in Texas. But assuming, arguendo, that they did not, the question arises - an important question which we believe the Supreme Court has not directly addressed - whether it is constitutionally permissible for Texas to impose personal jurisdiction upon GTO under such circumstances. We believe that the Court in Perkins v. Benguet implied that such policy on the part of Texas is constitutional.

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[14] See Prejean v. Sonatrach, 652 F.2d 1260, 1270 (5th Cir. 1981), holding that under Texas law a foreign corporation is amenable to jurisdiction for the purposes of all law suits brought within the state whether or not the cause of action relates to activities within the state, and Keene Corp. v. Hannah, 800 F.Supp. 490, 494 (W.D. Tex. Austin Div. 1992), holding that Texas' requirements for terminating registration are constitutional.

But the decision is not clear and we cannot find any other decision where the Court has clarified its position on that issue. We respectfully suggest that the Court should grant certiorari in order to clarify this important area of the law.[15]

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[15] There are a number of authorities which support the view that the Court should, particularly in a removal/remand situation, permit a state to impose in personam jurisdiction over GTO solely on the basis of GTO's registration to do business in Texas at the time of the accident made the basis of this suit. Compare Dalton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990), holding that it is constitutional for Minnesota to appoint an agent for a registered corporation for any cause of action, whether or not it arises out of the company's activities within the state, and Ladd v. Brickley, 158 F.2d 212 (1st Cir. 1946), cert. denied, 67 S.Ct. 675 (where the court discussed this precise question but did not make a conclusive decision on it, although it did cite Hunter as indicating that the cause of action arising during the registration period must be connected with activities within the state, 158 F.2d at 217, 218). Then there is 28 U.S.C. § 1359, which is designed to prevent parties from taking actions which result in expanding federal jurisdiction, and the cases construing it. See Miller & Lux. v. East Side Canal & I. Co., 29 S.Ct. 111 (1903); Kramer v. Caribbean Mills, Inc., 89 S.Ct. 1487 (1969); Oakley v. Goodnow, 118 U.S. 43 (1986); Martinez v. U.S. Olympics Committee, 802 F.2d 1275 (10th Cir. 1986); Provident Savings Life Assur. Soc. v. Ford, 114 U.S. 635 (1885); Deveck v. Japan CBM Corp., 877 F.2d 790 (9th Cir. 1989); and Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469 (2nd Cir. 1976).

The last two cases are of substantial significance to this case. The court in Deveck held that actions between a parent and subsidiary after the cause of action arises, which would otherwise create diversity jurisdiction, generate a presumption that they were done collusively "to create diversity jurisdiction" and unless the party seeking diversity jurisdiction goes forward with evidence rebutting that presumption, and proves that "there is a legitimate business reason" for the actions ostensibly creating diversity, the court

4. **Fednav Ltd.'s Contact With Texas, Through Ships Sailing In and Out of Texas Ports, Creates The Possibility That State Court Could Find Personal Jurisdiction As To The Alien Defendant Fednav.**

The alien defendant Fednav filed an affidavit by M-E Chlumecky which stated that Fednav is involved "in the shipping business" and that "over the last several years, some ships under Time Charter or Voyage Charter to Fednav Ltd., have called at various Texas ports". See Chlumecky Affidavit, supra, at 2. While the affidavit contends that these voyages were not sufficient to render Fednav subject to the in personam jurisdiction of the Texas courts, defendants did not overcome their heavy burden to show that there would be no possibility that the Texas courts could have found in personam jurisdiction over Fednav. See discussion with regard to the applicable test in determining this issue in Szabo v. Smedvig Tankredri, 95 F.Supp. 519 (S.D. N.Y. 1951), and the cases there cited,

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will reject federal jurisdiction. 877 F.2d at 792, 793. And see Prudential Oil Corp. at 476.

and Allenque v. Gulf and So. American S.S. Co., 103 F.Supp. 34, 35 (S.D. N.Y., 1952).

5. **In View of The Record in This Case, The Panel Majority of the Court of Appeals Effectively Emasculated Both The No Possibility and The Prima Facie Rule and Imposed an Intolerable Burden Upon Removed Parties In Fraudulent Joinder Cases.**

There is another reason why it is important for the Court to grant certiorari in this case. Although the district court erroneously refused to allow discovery in the case, the discovery elicited with regard to the forum non conveniens issue in the California cases, when taken together with Mr. Runion's affidavit and the Texas case law, makes it abundantly clear not only that the defendants failed to meet their burden of showing that there is "no possibility" that the Texas courts could have asserted in personam jurisdiction over at least one of the seven alien defendants, but also that the plaintiffs established a prima facie case with regard to in personam jurisdiction over CMI, GTO, SATOL and Fednav.

We have outlined above how Maguire,

Watkins, McLean and Nazareth indisputably established that CMC personnel occupied all major supervisory positions, including those dealing with the day-to-day operations, including those involving the vessels used in the lighterage operation in Saudi Arabia. Their testimony also demonstrated how CMC dominated CMI, GTO and SATOL and the operation in Saudi Arabia, thus rendering such subsidiaries nothing more than business conduits for CMC. They also testified as to how the operations in Saudi Arabia were shut down after the accident and most of the GTO/SATOL assets transferred to CMC and they discuss how CMI, GTO and SATOL were inadequately capitalized. Mr. Runion's affidavit[16] fully corroborates the

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[16] Both the district court and the Panel Majority of the Court of Appeals seemed unobjectively obsessed with the Runion affidavit, see 780 F.Supp. at 1477, n. 11 and 990 F.2d at 1497, n. 9. However, an objective analysis of the affidavit reveals that, while it does contain some legal opinions concerning which Mr. Runion is probably not qualified, and a quote from Mr. Maguire's deposition that creates a questionable inference, Mr. Runion does swear that he is "personally familiar with the facts stated herein"; outlines extensive experience in the offshore drilling industry; discusses his total familiarity with the multi-national, Crowley Maritime Corporation, and its subsidiaries, its modus operandi and the factual aspects of how it dominates its subsidiaries and has a very centralized operation; he discusses how he testified in another case

involving CMC and its subsidiaries and how the court in that case held that the subsidiaries were the alter-ego of CMC or vice-versa; he notes how he reviewed the information in the other case, the depositions and affidavits in this case and summarized the relevant excerpts from all of such depositions and evidence; he described how he checked with the secretary of state and undertook other investigation and found that GTO had not only been formally registered in Texas at the time of the accident, but how it had an operating office in Texas during that time; he described the corporate structure of CMC and its subsidiaries and how CMC acquired, after the accident, the assets of GTO and SATOL and shut down the operations in Saudi Arabia; he discussed how "CMC/GTO employees controlled and dominated SATOL generally and on a day-to-day basis"; and he expressed opinions that CMC so dominated CMI, GTO and SATOL that they were the business tool of CMC. See A 161-91. The courts below ignored all of the foregoing relevant testimony and focused solely upon the alleged misquote by Mr. Runion. See 780 F.Supp. at 1480.

Obviously, it would have been much better if Mr. Runion had included the portion omitted but he used the omission sign (...), clearly indicating that a portion had been omitted and the entire affidavit, including the omitted portion, was in the record before the court. Certainly Mr. Runion was not trying to hide anything and, indeed, as the district court indicated, the omitted portion was "obvious and easily discoverable". 780 F.Supp at 1480. Moreover, it is patently obvious that the only relevant portion of the excerpt – and the crucial one at that (and because it was crucial it seemed to enrage the district court) – was that "GTO had an office in Houston", probably in 1977 (and Mr. Runion's investigation determined that they were in fact officially registered to do business, as well as having an office in Texas, at that time). The district court's overreaction is much like the rule against impeachment on collateral matters and certainly did not justify the complete striking of Mr. Runion's affidavit. The striking of his affidavit is in conflict with the rationale of such Circuit Court decisions as Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), cert. denied, 105 S.Ct. 545 (1984); Payton v. Abbott Labs, 780 F.2d 238 (3rd Cir. 1983) and earlier Fifth Circuit decisions such as Poteet v. Dow Chemical Co., 868 F.2d 1428 (5th Cir. 1989); Osbourn v. Anchor Laboratories, Inc., 825 F.2d 908, 915, 916 (5th Cir. 1987) and Christopherson v. Allied-Signal Corp., 939 F.2d 1106,

undisputed testimony about GTO, its formal registration and office in Texas at the time of the accident and how CMC, at the time of the accident, and to this day, remains registered in Texas, with an office to do business there.

For the courts below to hold in these circumstances that it is clearly "not possible" for a Texas court to find in personam jurisdiction over GTO, CMI and/or SATOL, is to put them in conflict with numerous authorities, both state and federal. See Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986), (discussing Texas' law on alter-ego where a parent operates a subsidiary "as a mere tool or business conduit" and how Texas law imposes responsibility upon the parent where there is a transfer of assets out of a subsidiary corporation after the occurrence of the instance made the basis of the suit);[17]

1110 (5th Cir. en banc 1991). We respectfully submit that the Court would do well to examine this conflict also.

[17] In a rather shocking display of misreading the law, the Panel Majority of the Court of Appeals claimed that Petitioners' counsel had relied upon "Castleberry, 721 S.W.2d at 270, despite the fact that this case had been legislatively overruled four years earlier." See

Torregrossa v. Szelc, 603 S.W.2d 803 (Tex. 1980) (holding that inadequate capitalization is grounds in itself for applying the alter-ego doctrine); Gentry v. Credit Plan of Houston, 528 F.2d 571 (Tex. 1985); Product Promotions Inc. v Cousteau, 495 F.2d 483, 493 (5th Cir. 1974); Walker v. Walker, 583 F.2d 163 (5th Cir. 1978); Taca International Airlines v. Rolls Royce of England, 204 (N.E.2d N.Y. App. 1965); and 2 J. Moore and Lucas, Moore's Federal Practice, 41 4.25 [6] at 4-273 (2 Ed. 1982). (Reul, Product Promotions, Walker and Taca all hold that the presence of a parent or subsidiary for in

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990 F.2d at 1496, 1497 n. 8. As authority for that statement, the Panel Majority cited Farr v. Sun World Sav. Assn., 810 F.2d 294 (Tex. App.—El Paso 1991). It is obvious that the Panel Majority did not read this case because if it had it would have read the following: "As can readily be seen, the amendments to Article 2.21A effectively eliminated constructive fraud and the failure to observe corporate formalities and requirements. . .in connection with contract claims, but left untouched the effect of constructive fraud on tort." 810 S.W.2d at 296 (emphasis ours). Since this case is indisputably a tort case, the rules announced in Castleberry very much apply to this case. The Petitioners pointed this mistake out to the Panel Majority in their Motion for Rehearing, but, not only did the Panel Majority not grant the Motion, it did not correct the citation or the opinion. The failure to do so obviously will create precedential confusion with respect to future cases dealing with this issue.

personam jurisdictional purposes can constitute the presence of the other); Rittenhouse v. Mabry, 832 F.2d 380 (5th Cir. 1987) (the contacts of a physician, who was present in the forum, were attributed to a nonresident professional corporation for in personam jurisdiction purposes); Hitt v. Nissan Motor Company, Ltd., 399 F.Supp. 838, 846-47 (S.D. Fla. 1975) ("The contacts of Nissan-USA on behalf of Nissan-Japan . . . and the presence of franchise dealers are sufficient for in personam jurisdiction."); Hargrove v. Fibreboard, 710 F.2d 1154, 1159 (5th Cir. 1983) ("it has long been recognized . . . that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent 'does business' in a jurisdiction through the local activities of its subsidiaries"); Reul v. Sahara Hotel, 372 F. Supp. 995, 997 (S.D. Tex. 1974) (activities of New York corporation in Texas could be imputed to California corporation and California corporation could be said to be "doing business" in Texas for purposes of in personam jurisdiction); Thompson

v. Chrysler Motors Corp., 755 F.2d 1162, 1165-66 (5th Cir. 1985); Dudley v. Smith, 504 F.2d 979 (5th Cir. 1975) (applying alter-ego with less control than in present case); Maritime Transport Overseas, Inc v. Saudi Research and Development Corp., 507 F.Supp. 701 (S.D. Tex., Hou. Div. 1981); Bamford v. Hobbs, 569 F.Supp. 160 (S.D. Tex. Hou. Div. 1983); Energy Reserves Group Inc. v. Superior Oil Co., 460 F.Supp. 483, 502 (D. Kan. 1978); and Wells Fargo & Co. v. Wells Fargo Corp. Co., 556 F.2d 406 (9th Cir. 1977).[18]

With all due respect, the manner in which

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[18] In the Wells Fargo case, the court stated:

> While Nevada courts do not appear to have attempted to define the statutory terms agent and instrumentality, several other courts have recognized the existence of such a relationship as a basis on which, consistent with due process and the long-arm statutes before them, the principal may be served for the in-state actions of the agent.

556 F.2d at 419. See also, Beecham v. Pippin, 868 S.W.2d 356 (Tex. App.—Austin 1985, no writ); Cabalcetta v. Standard Fruit, 883 F.2d 1553 (11th Cir. 1989); I.A.M. National Pension Fund Benefit Plan v. Wakefield Industrial Inc., 699 F.2d 1254 (D.C. App. 983); Cavic v. Ground Ball Bahama Dev. Co., 701 F.2d 879 (11th Cir. 1983); Marsh v. Kitchen, 480 F.2d 1270 (2d Cir. 1973); U.S. v. Montreal Trust Co., 358 F.2d 239 (2nd Cir. 1966); Quarles v. Fuquels Industries, Inc., 504 F.2d 1358 (10th Cir. 1974); and Harris v. Derre and Co., 223 F.2d 161 (4th Cir. 1955).

the courts below blatantly disregarded the undisputed evidence in the record concerning domination and control by CMC, the impact under Texas law of the post-accident transfer of assets, the inadequate capitalization of the subsidiaries, the registered presence of GTO at the time of the accident and the use of Texas ports by Fednav, and all of the other circumstances revealed by the evidence in the record, constitutes an effective emasculation of both the "no possibility" and the "prima facie" rule. If the decision in this case is allowed to stand, an ominous uncertainty will have been introduced into the law pertaining to fraudulent joinder cases and the question of personal jurisdiction through related entities, agents or parent/subsidiary corporations.

C. Certiorari Should Be Granted To Decide The Question Whether A Federal Court In A Removal Case, Once It Determines That It Is Going to Decline Jurisdiction On Forum Non Conveniens Grounds, Should Remand To State Court Rather Than Dismissing.

This Court has never decided the above stated issue. There is a general line of

authorities holding that, in situations where a removal court decides it is going to decline jurisdiction on ground of forum non conveniens, it should remand rather than dismiss.

In 76 C.J.S., Removal of Cases § 266, the rule is well-stated:

> A cause previously removed from a state court to a federal court should not be dismissed by such court because its jurisdiction is lacking or has ceased to exist; nor should it be dismissed under the doctrine of forum non conveniens, but it should be remanded to the state court."

76 C.J.S. at 1124 (emphasis ours). See also, Murray v. Union Pac. Ry. Co., 77 F.Supp. 613, 614 (D.C. Ill. 1948); Buroes v. Proctor & Gamble Defense Corp., 172 F.2d 541 (5th Cir. 1949); and Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

Professor Moore explains why the rule applied in Murray and the cases cited above is the only just way to handle a case removed from state court when the federal court elects not to accept jurisdiction on the basis of the doctrine of forum non conveniens:

If the federal court to which the action

> is removed is not prepared to go forward with the case and there is no convenient federal venue to which the suit can be transferred, then, to our mind, simple justice requires a remand to the state court so that it can go forward with the case or dismiss it, as it sees fit. The doctrine of forum non conveniens is a procedural, not a jurisdictional doctrine; and the federal court should not impose its procedural doctrine upon a plaintiff who did not invoke its jurisdiction, for the purpose of preventing an adjudication in both federal and state forums. The purpose of removal jurisdiction is to give a defendant, in certain cases, a right to trial in a federal forum, not a means of escaping trial in both state and federal forums.

1A Moore's Federal Practice, Removal Procedure, § 0.169 [1], pp. 684-5; emphasis ours.[19]

We submit that the Court should grant certiorari and resolve the conflict on this important issue in the manner suggested by Professor Moore.

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[19] While, as we noted above, this Court has never addressed the issue, it has decided, in a somewhat analogous situation, that a federal court can remand rather than dismiss, where it declines discretionary jurisdiction. See Carnegie-Mellon v. Cohill, 108 S.Ct. 614, 621, 622 (1988) (involving pendent jurisdiction situations). In addition to the rulings of the lower courts in this case, there are other decisions which are in conflict with the authorities we have cited and hold that a federal court can dismiss a removed case rather than remanding, even though it has decided to decline jurisdiction on ground of forum non conveniens. See, e.g., Nolan v. Boeing, 919 F.2d at 1070.

D. The Court Should Grant Certiorari To At Long Last Resolve the Issue Of Whether Federal or State Forum Non Conveniens Law Applies In a Diversity Case In Federal Court, When The Resolution Of That Issue Makes a Difference In The Outcome.

This Court has long pretermitted the resolution of the above stated issue. See Gulf Oil v. Gilbert, 67 S.Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 102 S.Ct. 252, 262 (1981). The reason the Court deferred the issue in Gilbert and Reyno is that there was no difference between federal and state forum non conveniens law in those cases. As we have explained above, there is the difference of life and death between federal and Texas state forum non conveniens law. See Dow Chemical Co. v. Alfaro, supra, 786 S.W.2d at 678[20].

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[20] The Texas legislature has recently amended Texas law to modify Sect. 71.031 of the Tex. Civ. Prac. & Rem. Code (commonly referred as the open forum statute). See Sect. 71.051 of Tex. Civ. Pract. & Rem. Code. However, all cases filed, such as this one, before September 1, 1993 are to be decided under the open forum statute. Therefore, there is a vast difference between federal and Texas forum non conveniens law that is applicable to this case. If the defendants argue that the change in Texas forum non conveniens law, though the change does not apply to this case, reduces the significance of this issue, we make two points: first, the new statute is, as can be seen from a reading of the statute, far more generous to the plaintiffs than current federal forum non conveniens law; and, second, there are still a

In Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945), the Second Circuit, in an opinion by the distinguished Judge Learned Hand, held that a federal court sitting in diversity, after removal from state court, must, in determining the forum non conveniens issue, apply state forum non conveniens law if the outcome would have been different had the court applied federal forum non conveniens law. 149 F.2d at 195. See also, Medow Industries, Inc. v. Kirsch Company, Inc., 356 F.Supp. 52, 55 (S.D. N.Y. 1973).

In two other circuits the courts have held that a federal court sitting in diversity should apply federal forum non conveniens law. Sibaja v. Dow Chem Co., 757 F.2d 1215 (11th Cir. 1985) and In re Air Crash Near New Orleans, La., 821 F.2d 1147, 1154-59 (5th Cir. 1987) (en banc). However, neither of those cases involved causes that had been removed from state court, whereas

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substantial number of states where state forum non conveniens law is more favorable to plaintiffs than federal forum non conveniens law. These states include Florida, Louisiana, Missouri, Connecticut, Kansas and South Carolina, among others. Therefore, the issue continues to have a significant impact upon the field of forum non conveniens law.

Weiss v. Routh was a removed case.[21]

In Guaranty Trust Co. v. N.Y., 65 S. Ct. 1464 (1945), this Court held that, "putting to one side abstractions regarding 'substance' and 'procedure'", it would apply the Erie doctrine "with an eye alert to essentials in avoiding disregard of state law in diversity cases in the federal courts" and would apply state law, even if labeled "procedural", if the failure to do so would result in a different "outcome" in the federal court. Id. at 1469-70.

We urge the Court to grant certiorari on this issue in order to resolve the conflicts among the circuit courts, and with the rationale of the "outcome determinative" doctrine adopted

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[21] The reason the "removal" ingredient provides, we submit, a more compelling case for application of state forum non conveniens law, as was held in Weiss v. Routh, is that the forum non conveniens doctrine centers upon "choice of forum" by the plaintiffs. See Gulf Oil v. Gilbert, 67 S.Ct. at 843. In this case, as in Weiss, the plaintiffs chose the state forum, not the federal forum. That choice of forum, and the outcome plaintiffs would obtain in the chosen forum, must be honored. That is the essence of the Erie doctrine as Judge Hand recognized in Weiss v. Routh, 149 F.2d at 195. See Pennzoil v. Texaco, 107 S. Ct. 1519 (1987) and Chick Kam Choo v. Exxon, 108 S. Ct. 1684, 1691 (1988), holding that the Texas courts are fully capable of resolving relevant issues.

by this Court in order to preserve the integrity of the Erie doctrine.

E. As To The Forum Non Conveniens Question, Petitioners Suggest It Is Time For the Court To Reexamine That Issue.

The Court has not fully examined the forum non conveniens issue since its decision in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252 (1981). A lot has happened since then and the world has accelerated its meteoric march to change. One great change has been the introduction of the facsimile process. Another has been the trend toward telephone depositions and even depositions by transcontinental video hookup. Moreover, all forms of transcontinental travel have become more streamlined and accessible. The world is much different from that which existed in 1981 and even more different from that which existed in 1947, when this Court decided Gulf Oil v. Gilbert.

Moreover, while the Court in Piper sanctioned the use of stipulations by defendants in order to make the grant of the motion more feasible, and as a matter of simple justice the

lower federal courts should also accept and give effect to stipulations tendered by the plaintiffs, the courts below have ignored them in this case.[22] We cannot emphasize enough the importance of these stipulations. They drastically shift the impact of convenience/inconvenience on the litigation. Furthermore, this case fortifies the proposition that only in the United States - particularly considering the inability to take depositions of foreign witnesses if the litigation were pending

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[22] These stipulations are: to present plaintiffs in the United States for deposition and trial and for examination by experts of defendants' choice; to use American experts with regard to both liability and damages, such experts being easily available for deposition and trial in the United States; and to pay the cost of transportation of counsel for the defendants to go to Saudi Arabia or the Philippines, the two proposed alternative fora in this case, to take the depositions of any relevant witnesses located there, should the defendants want to take their depositions (if any witnesses can be found there, which the record makes extremely doubtful). Indeed, the willingness to pay travel expenses of defendants' counsel, though generally ignored by recent decisions, has been given effect by some courts. See Irish National Insurance Co. v. Aer Linquis, 739 F.2d 90, 92 (2nd Cir. 1984) (holding that the fact that the plaintiffs had stipulated they would pay the costs of counsel to go to Ireland to take depositions there was a controlling factor in denying the forum non conveniens motion); and Costa v. Textron, No. CA-4-81-233 (N.D. Tex. 1984) (forum non conveniens motion denied because plaintiffs paid defendants' counsel's expenses to go to Brazil to take depositions there).

in Saudi Arabia or the Philippines - can this truly international case be fully, fairly and justly tried.

And this brings us to the development of statistics and information concerning how the forum non conveniens doctrine has fared since 1981. This is fully discussed by Justice Doggett in his concurring opinion in Dow Chemical Co. v. Alfaro, 786 S.W.2d at 682, 683. There he discusses the realities of how the doctrine has become outcome determinative – that dismissals to foreign fora terminate the litigation in most of the cases.

Moreover, it is patently clear that the lower federal courts have become far too aggressive in applying the doctrine. See, e.g. cases where the courts have threatened mandamus or reversed and rendered where the district court has exercised its discretion to retain jurisdiction. Munasamy v. McClelland Engineering, 579 F.Supp. 149 (E.D. Tex. 1984), mandamus threatened in Re McClelland Engineers, Inc. 742 F.2d 837 (5th Cir. 1984) and forum non

conveniens denials reversed and rendered in McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313 (5th Cir. 1986) and De Oliveiro v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir. 1983).

Some courts – certainly not the courts below – have become realistic about whether a foreign forum is truly an adequate alternative forum. For example, in Mercier v. Sheraton Intern., Inc., 935 F.2d 419, 425 (1st Cir. 1991), the court held that, as a matter of law, the defendants failed to meet their burden of establishing that Turkey was an adequate alternative forum.[23] Similarly, the real truth is that neither Saudi Arabia nor the Philippines are adequate alternative fora in this case.

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[23] See also, Watson v. Merrell Dow Pharmeceuticals, Inc., 769 F.2d 354 (6th Cir. 1985); Lacey v. Cessna Aircraft Company, 932 F.2d 170 (3rd Cir. 1991); Nieminen v. Breeze Eastern, a Division of Transtechnology Corporation, 736 F.Supp. 580 (D.C.N.Y. 1990); Crimson Semiconductor, Inc. v. Electronum, 629 F.Supp. 903 (S.D.N.Y. 1986); McKrell v. Penta Hotels (France) S.A., 703 F.Supp. 13 (S.D.N.Y. 1989); Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F.Supp. 688 (S. D.N.Y. 1986); Recumar Inc. v. KLM Royal Dutch Airlines, 608 F.Supp. 795 (D.C.N.Y. 1985); Hatzlachh Supply Inc. v. Tradewind Airways Limited, 659 F.Supp. 112 (S.D.N.Y. 1987).

In addition, the duty of nations to regulate and monitor the conduct of multi-nationals who base their operations there, is one that pervades the ethical aspects of international law. As the multi-nationals have made rapid gains in international dominance in the last ten years the need for the enforcement of this duty has correspondingly increased. Yet the courts below, and most federal lower courts in recent decisions, implicitly take the position that no such duty exists.

In the final analysis, this case is an excellent one demonstrating the urgent need for this Court to grant certiorari in order to fully reexamine the forum non conveniens doctrine. To begin with, although the defendants offered no evidence on the issue of location of witnesses and other relevant circumstance, as they existed at the time of the district court's determination, the courts below did not seem to mind; they decided the issue as if no evidence

were necessary.[24] It is undisputed that there are no witnesses in Saudi Arabia. There are no witnesses in the Philippines except the plaintiffs (who will be brought to the United States at their own expense). The surviving crew members, based upon last report, are probably in the Gulf of Mexico, not far from the Texas jurisdiction. The captain is either in the Gulf of Mexico or in Vietnam. Based on the deposition testimony before the court, the supervisory witnesses whose location could be identified are all in the United States. Yet, the district court, in making its analysis, unfairly gave effect to defendants stipulations and ignored the

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[24] This violates even Fifth Circuit law. See In Re Aircrash New Orleans, 821 F.2d 1147 (5th Cir. 1987) (en banc). The en banc court held that the circumstances at the time of filing the current motion control the forum non conveniens determination. 821 F.2d at 1156. It also held that the court must have sufficient evidence before it so that it can make a thorough analysis of the forum non conveniens factors and "explain its decision-making process clearly and in sufficient detail to permit us (the appellate court) adequately to review it, either by giving written reasons or by dictating the reasons for its decision into the record with the same degree of explicitness." 821 F.2d at 1166-67. The fact that defendants, the proponents of the forum non conveniens motion, failed to offer any evidence on the motion or to make any attempt to satisfy their burden, in itself should have evoked remand by the Court of Appeals.

plaintiffs; stated that it "carefully" examined the record but never mentioned any of the deposition testimony about the location of witnesses of Maguire, Watkins, McLean and Nazareth; and then made the astounding statement that "there is no evidence to indicate that the cost of obtaining witnesses would be any more difficult in the Philippines than in Texas" (cost for what witnesses?) None of the liability witnesses will be obtainable in the Philippines and therefore plaintiffs would never be able to prove their case there. See 780 F.Supp. 1484, 1485.

Again, this case is a classic example of why this Court should grant certiorari and revisit the forum non conveniens doctrine. We respectfully suggest that, while there is, in more narrow circumstances, perhaps a justification for the doctrine, an unfortunate pattern has evolved in the federal courts for using the doctrine to reduce dockets rather than to obtain justice and in doing so, the consequence has been a regretful xenophobic

discrimination against foreign plaintiffs. We hope the Court will, in view of modern travel and technology, and the importance of the other considerations discussed above, authorize the use of the doctrine only where defendants clearly prove that there are a number of witnesses crucial to their case whose testimony cannot be secured in the United States court under reasonable circumstances but can, with certainty, be secured in the alternative forum. This will, we concede, drastically reduce the number of instances where the motion would be granted. But, at least the plaintiffs would have a chance to secure substantial justice, through a trial on the merits, whereas now, when the motion is granted, in reality the right of most plaintiffs come to an end.[25]

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[25] The courts below also granted an injunction. Because this injunction extends to potential state court litigation, we believe it violates this Courts holding in Chick Kam Choo v. Exxon, 108 S.Ct. 1684 (1988). We suggest that, should the court grant certiorari, it would be propitious to clarify the scope of the Chick Kam Choo decision and whether it in fact does preclude such an injunction.

F. The Granting of Sanctions In This Case Should Be Examined By The Court Because of Its Potential For Chilling Innovative Advocacy

An objective examination of the grounds expressed by the district court and the Panel Majority of the Court of Appeals reveals that the courts below imposed sanctions upon Gary Riebschlager, plaintiffs counsel in the district court, in the punitive sum of $51,747.53, simply because he had the audacity to argue for a clarification of, or change in, existing law. What made his actions as a matter of law reasonable and permissible is that every position he took involved an issue that was not clear under Fifth Circuit law, or if the Fifth Circuit had made a holding expressly contrary to plaintiffs' position, there were conflicting holdings by other courts and this Court has not yet resolved those conflicts. Therefore, it was clearly error and an abuse of discretion for the courts below to grant sanctions in this case. See Cooter & Gel v. Harmarks, 110 S.Ct. 2447, 2457-58 (1990); Mareno v. Rowe, 910 F.2d 1043

(2nd Cir. 1990); Davis v. Carl, 906 F.2d 533 (11th Cir. 1990); Westlake North Property Owners v. Thousand Oaks, 915 F.2d 1301, 1307 (9th Cir. 1990); Teamsters Local Union No. 430 v. Cement Express Inc., 841 F.2d 66 (3rd Cir. 1988); U.S. Industries Inc. v. Touche Ross Co., 854 F.2d 1223 (10th Cir., 1988); and Schaefer v. Transportation Media Inc., 859 F.2d 1251 (7th Cir. 1988). The Panel Majority, in its zeal to punish plaintiffs' counsel, even contradicted earlier Fifth Circuit decisions, see, e.g., Smith v. Our Lady of the Lake Hospital Inc., 960 F.2d 439 (5th Cir. 1992).

The Court, we suggest, should grant certiorari in order to ensure that decisions such as the one in this case, which have the definite effect of chilling innovative litigation and zealous advocacy are not allowed to stand and, further, in order to resolve the conflict between the decision of the Panel Majority in this case and the other cases cited above.

WHEREFORE, Petitioners pray the Court to grant a writ of certiorari for all the reasons stated in this Petition.

Respectfully submitted,

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